SUPREME COURT U.S.
OCT 4 2007
OFFICE OF THE CLERK

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

ANDRE MERDJANIAN, Individually and as Administrator of the ESTATE OF SONIA T. MERDJANIAN, Deceased, RAFFI MERDJANIAN and ANDRE MERDJANIAN,
Petitioners

v.

NATIONWIDE MUTUAL INSURANCE COMPANY
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether this Honorable Court should review the decision of the Court of Appeals for the Third Circuit wherein, in affirming the summary judgment entered in favor of Respondents, Nationwide Mutual Insurance Company, the decision of the Court of Appeals has created a conflict and fundamental split between the Third Circuit and the Commonwealth of Pennsylvania Courts on an issue of substantive law, creating opposite results for federal and state court litigants involving the same facts, depriving Pennsylvania residents the benefits and privileges of Pennsylvania Law, with such split resulting in the federal courts being a more favorable forum for insurance companies, and such a correction of such split would provide uniformity of decisions amongst all of the Courts.

PARTIES TO THE PROCEEDING

Petitioners:
Andre Merdjanian, Individually and as Administrator of the Estate of Sonia T. Merdjanian, Deceased, Raffi Merdjanian and Andre Merdjanian

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Respondents:
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ORDERS AND OPINIONS BELOW

The January 4, 2007 order denying rehearing, and the September 20, 2006 opinion of the Court of Appeals for the Third Circuit, whose judgment is sought to be reviewed, are cited as 2006 WL 2686655, and are reprinted in the separate Appendix to this Petition at App. 28 and App. 1, respectively. The prior opinion of the United States District Court for the Eastern District of Pennsylvania, entered March 7, 2005, is cited as 2005 WL 545299, and is reprinted in the separate Appendix to this Petition at App. 12.

JURISDICTION

The Third Circuit Court's Order denying Petition for Rehearing was entered on January 4, 2007. (App. 28). The Third Circuit Court entered an Opinion on September 20, 2006. (App. 1). Judgment was entered September 20, 2006. (App. 10). The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. § 1254(1).

STATUTES INVOLVED

The pertinent portion of 75 Pa.C.S.A. § 1731 is reprinted in the separate Appendix to this Petition, App. 29, and is as follows:

> **Availability, scope and amount of coverage.**
> **Mandatory offering.**-- No motor vehicle liability insurance policy shall be delivered or issued for delivery in this Commonwealth, with respect to any motor vehicle registered or principally garaged in this Commonwealth, unless uninsured motorist and underinsured motorist coverages are offered therein or supplemental thereto in amounts as provided in section 1734 (relating to request for lower limits of coverage). Purchase of uninsured motorist and underinsured motorist coverages is optional.

75 Pa. Cons. Stat. Ann. § 1731 (Purdon 1996).

The pertinent portion of 75 Pa.C.S.A. § 1734 is reprinted in the separate Appendix to this Petition, App. 33, and is as follows:

> **Request for lower limits of coverage.**
> A named insured may request in writing the issuance of coverages under section 1731 (relating to availability, scope and amount of coverage) in amounts equal to or less than the limits of liability for bodily

injury.

75 Pa. Cons. Stat. Ann. § 1734 (Purdon 1996).

STATEMENT OF THE CASE

This case was brought by Respondent as an action for declaratory judgment regarding Petitioners' Uninsured/Underinsured (UM/UIM) motorist benefits. On June 10, 2001, an uninsured motorist killed Sona Merdjanian and injured her two sons, Hagop and Raffi Merdjanian. Petitioners then sought to recover their UM benefits under their motor vehicle policy of insurance with Respondent, Nationwide Mutual Insurance Company, in the amount of $100,000 per person and $300,000 per occurrence. Nationwide filed this declaratory action in federal court, on the basis of diversity under 28 U.S.C.A. § 1332, seeking a declaration that the Petitioners' UM/UIM limits were no more than $15,000 per person and $30,000 per occurrence.

The Third Circuit Court, in affirming summary judgment in favor of Nationwide, rendered an Opinion that is in conflict with and contrary to Pennsylvania substantive law, significantly limiting the rights that Petitioners, as Pennsylvania citizens, would otherwise have in state court. The Third Circuit found that Petitioners' UM/UIM benefits were significantly less than they would have been if a Pennsylvania Court had decided the case. Thus, the result is that Pennsylvania residents who would otherwise have the full benefit of Pennsylvania law, are deprived of those benefits if they find themselves in federal court, even where the sole basis of federal court jurisdiction is diversity and the claims arise exclusively under Pennsylvania law.

At the time of the accident, Andre Merdjanian, the spouse of the decedent, insured three motor vehicles with Nationwide. At that time, Merdjanian's liability (bodily injury) coverage limits were $100,000 per person and $300,000 per occurrence. Merdjanian's policy with Nationwide was originally purchased in July of 1990. The liability limits in 1990 under the policy were $25,000 per person and $50,000 per occurrence. Under Pennsylvania Law, before an insured may elect UM/UIM benefits in an amount less than his liability limits, he must

execute a reduction of coverage form expressly requesting UM/UIM limits that are less than the liability limits. 75 Pa.C.S.A. § 1734. Thus, contemporaneous with Merdjanian's purchase of motor vehicle insurance in July of 1990, and in accordance with the statutory scheme, Merdjanian signed a reduction of coverage form to reduce his UM/UIM benefits to $15,000 per person and $30,000 per occurrence.

Approximately one year later, in June of 1991, Merdjanian added a second vehicle to this policy with Nationwide and thus paid a higher premium. From that time, through the date of the accident in June 2001, Merdjanian added and removed vehicles from his insurance policy insuring at least two, and on occasion three vehicles, under this policy with Nationwide.

Specifically, on August 26, 1997, Merdjanian increased the limits of his liability coverage from $25,000 per person and $50,000 per occurrence, to $100,000 per person and $300,000 per occurrence when he added coverage for a 1998 Dodge Durango. In connection with the increase in Merdjanian's liability coverage limits, Nationwide generated and issued new reduction of coverage forms for Merdjanian to sign, in accordance with 75 Pa.C.S.A. § 1734. However, Merdjanian never signed nor returned the required reduction of coverage forms to Nationwide. Merdjanian attested that he did not sign the forms reducing his UM/UIM coverage because he did not want his UM/UIM limits to be less than his liability limits of $100,000 per person and $300,000 per occurrence.

On April 17, 2001, less than two months before the accident with the uninsured motorist, Merdjanian again made changes to his insurance coverage with Nationwide. On the aforesaid date, Merdjanian added one of his sons as a driver on the policy, added a third motor vehicle to the policy, and changed some of his coverages relating to collision. Merdjanian attested that at that time, he requested that he be provided with full coverage such that his liability coverage and UM/UIM coverages matched. Merdjanian believed that his requests and subsequent changes in his policy were made in consideration for increased premiums.

Thus, at the time of the accident, the only reduction of coverage form signed by Merdjanian was from July 1990 (11 years prior to the accident). No other reduction of coverage form was ever signed by Merdjanian despite the fact that subsequent policy changes were made, including the increase in liability limits, and resulting in increased premiums. Merdjanian also attested that he had refused to sign the coverage reduction form after increasing his liability coverage, as set forth above. Since Merdjanian never executed a reduction of coverage form upon increasing his benefits under his policy of insurance, he must be deemed to have UM/UIM coverage equal to his bodily injury limits of $100,000 per occurrence and $300,000 per incident. Blood v. Old Guard Insurance Co., 894 A.2d 795 (Pa.Super. 2006), petition for allowance of appeal to Pa. Supreme Ct. granted, 2007 WL 77327; 75 Pa.C.S.A. § 1731; 75 Pa.C.S.A. § 1734. All of Merdjanian's changes to his insurance after July of 1999 were for increased benefits, resulting in increased premiums paid by Merdjanian.

REASONS FOR GRANTING WRIT

The decision of the Third Circuit Court of Appeals should be reviewed by this Court because, in applying Pennsylvania law, the Third Circuit made a decision in direct conflict with Pennsylvania Law, creating a fundamental split between federal and Pennsylvania courts on a significant issue of Pennsylvania substantive law, providing a more favorable forum for insurance companies and permitting insurance companies to circumvent Pennsylvania law designed to protect insureds, such as Petitioners. Pennsylvania law provides that when there is a change in a policy of motor vehicle insurance, and an insured is sold UM/UIM coverage limits in an amount less than his liability coverage limits, then written reduction of UM/UIM coverage forms must be executed. Blood v. Old Guard Insurance Co., 894 A.2d 795 (Pa.Super. 2006), petition for allowance of appeal to Pa. Supreme Ct. granted, 2007 WL 77327; 75 Pa.C.S.A. § 1731; 75 Pa.C.S.A. § 1734.

The Third Circuit Court erred in rejecting this law and made a pronouncement of law fundamentally in conflict with Pennsylvania precedent on this very issue. In rejecting the Pennsylvania Superior Court's en banc decision in Blood, the Court of Appeals rejected Pennsylvania law and the Pennsylvania statutory scheme requiring that UM/UIM coverage be equal to liability limits unless a proper reduction of coverage form is executed. Id. Blood clearly held that where the insured of a motor vehicle subsequently changes his liability policy limits, a *new,* written and signed election form reducing UM/UIM limits *must* be produced by the insurer. Id. If no new form was signed by the insured, as in the instant case, *the statutory presumption that UM/UIM limits are equal to bodily injury liability limits would apply.* Id. at 5. Blood is now pending before the Supreme Court of Pennsylvania.

The facts in Blood, just as the facts in the instant case, involve the initial election of UM/UIM limits lower than the liability limits; subsequently, when liability limits were changed,

no new reduction of coverage forms were executed. Id. Thus, Blood held that the UM/UIM limits were presumed equal to the liability limits. Id. This law should be binding on the instant case and Petitioners' UM limits should be deemed to be equal to the liability limits of $100,000 per person and $300,000 per occurrence.

Blood further specifically found that under the Pennsylvania statutory scheme, the *insurer* should bear the burden of any misunderstanding in UM/UIM coverage. Id. This finding was explicitly rejected by the Court of Appeals' decision in this action, thus causing the insured to bear the burden of a misunderstanding. This places a Pennsylvania litigant on completely different footing when before a federal court, despite the fact that the issues and law are identical.

The Pennsylvania court in Blood, specifically considered the intent of the Pennsylvania legislature and the Pennsylvania statutory scheme involving UM/UIM coverage. Id. The Pennsylvania statutory scheme regarding UM/UIM benefits is to "avoid confusion and litigation by providing a presumption that in the absence of an explicit written election, the UIM coverage limit is equivalent to the liability coverage limit." Id. The Petitioners in this case would have been given the benefit of this presumption if the case had been filed in Pennsylvania and thus decided by a Pennsylvania Court. Merely because the case was filed in Federal Court, despite the fact that the only basis was diversity jurisdiction and the Third Circuit applied Pennsylvania law, the Petitioners have been faced with an entirely different outcome. This outcome is not the one intended by Pennsylvania law, the Pennsylvania courts, nor the Pennsylvania legislature. Further, all indications are that the Pennsylvania Supreme Court will affirm the decision in Blood, given that the Superior Court's decision in Blood is en banc, and based upon considerations of legislative intent and interpretation of a Pennsylvania Statute. Id.

The Third Circuit Court's artificially created split between the federal courts applying Pennsylvania law and Pennsylvania courts, creates a federal forum that is more favorable to insurance

carriers than the companion state court applying their own laws. This also encourages forum shopping on the part of the insurance companies and permits them to circumvent Pennsylvania law designed to protect insureds from the very situation that Petitioners are faced with now.

Thus, this Honorable Court should grant this Writ to resolve a fundamental conflict and split between the Third Circuit and the Pennsylvania Courts on this important issue of substantive law. This split, as created by the Court of Appeals, creates federal law that is more favorable to insurance carriers than the law as stated by the Pennsylvania Courts. A split in decisions in the Pennsylvania courts and federal court, resulting in federal court being a more favorable forum for insurance companies, should not exist and should be corrected so as to provide uniformity of decisions amongst all of the Courts.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Petition for a Writ of Certiorari be granted.

Respectfully Submitted,

BY:_____

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ANDRE MERDJANIAN, Individually and as Administrator of the ESTATE OF SONIA T. MERDJANIAN, Deceased, RAFFI MERDJANIAN and ANDRE MERDJANIAN,
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APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

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United States Court of Appeals,
Third Circuit.
NATIONWIDE MUTUAL INSURANCE COMPANY
v.
Andre-MERDJANIAN, Individually and as Administrator of the Estate of Sona T. Merdjanian, Deceased, Hagop Merdjanian, and Raffi Merdjanian, Appellants.
No. 05-1790.
Submitted Under Third Circuit L.A.R. 34.1(a) Sept. 15, 2006.

Filed: Sept. 20, 2006.

OPINION

GARTH, Circuit Judge:

I.

**1 Appellant Andre Merdjanian purchased an auto insurance policy from Appellee Nationwide Mutual Life Insurance Company ("Nationwide") on July 16, 1990. The policy, which took effect on July 17, 1990, provided bodily injury liability limits of $25,000 per person and $50,000 per occurrence ($25,000/ $50,000) and uninsured and underinsured motorist coverage ("UM/UIM") of $15,000/$30,000. In the process of applying for the policy, Merdjanian also signed an "Uninsured Motorist Coverage Authorization Form," in which he selected UM/UIM coverage in the amount of $15,000/$30,000. It is undisputed that this was the only form signed by Merdjanian relating to UM/UIM insurance.

On August 26, 1998, Merdjanian added an additional vehicle to his policy, and contemporaneously increased the limits of his liability coverage from $25,000/ $50,000 to $100,000/$300,000. In response, Nationwide mailed forms to Merdjanian giving him the option of changing the limits of his UM/UIM coverage. The form pertaining to uninsured motorist coverage stated: "Send this

form ... if you want to change the limits of your Uninsured Motorist Coverage." The second form contained identical language with respect to underinsured motorist coverage. Merdjanian concedes that these forms "were never signed nor returned by him."

*80 On April 17, 2001, Merdjanian met with Rocco J. Polidoro, an authorized seller of Nationwide insurance, to add a third car to the policy. Merdjanian asserts that, at this meeting, he requested "full coverage for my whole family." Merdjanian testified that he intended by this request to raise his UM/UIM coverage to the same coverage limit as his liability: $100,000/$300,000. It is undisputed, however, that he did not specifically ask Polidoro to increase his UM/UIM coverage and that he did not sign any forms requesting a change in his UM/UIM coverage. Nationwide subsequently issued a "Declarations Page" to Merdjanian, dated April 23, 2001, stating that his policy provided coverage of $100,000/$300,000 for liability and $15,000/$30,000 of UM/UIM coverage. Merdjanian did not object to these coverage limits, and paid premiums for the coverage reflected in the April 23, 2001 Declarations Page.

On June 10, 2001, Merdjanian's wife was killed, and his two sons injured, when an uninsured motorist struck one of the vehicles covered under his Nationwide policy.

II.

Merdjanian and his two sons subsequently submitted a claim to Nationwide for UM/UIM benefits in the amounts of $300,000/$900,000.FN1 In response, Nationwide filed a declaratory judgment action against Merdjanian requesting a declaration that the policy limited UM/UIM coverage to $15,000/$30,000 for all uninsured motorist claims arising out of the June 10, 2001 accident. Merdjanian responded with a counterclaim, seeking reformation of the Nationwide policy to reflect his entitlement to UM/UIM coverage of $300,000/$900,000.

FN1. Merdjanian arrived at this figure by "stacking" the $100,000/ $300,000 liability coverage the policy provided for each of his three vehicles. "Stacking" coverage allows an insured to combine the limits of per-vehicle coverage for all the vehicles on the policy to pay the loss from a single occurrence.

Both parties moved for summary judgment. On March 7, 2005, the district court granted summary judgment in favor of Nationwide, holding that the Merdjanians' UM/UIM coverage was limited to $15,000/$30,000. We affirm.

III.

**2 In this appeal, Merdjanian argues that, despite his signed authorization for only $15,000/$30,000 of UM/UIM coverage, Nationwide must nevertheless provide such coverage in the amount of $100,000/$300,000 under Pennsylvania's Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. § 1701 et seq. ("MVFRL"). Merdjanian asserts that, pursuant to the MVFRL, any policy issued by an automobile liability insurer must provide UM/UIM coverage in an amount equal to the policy's liability coverage unless the insured has signed a valid coverage reduction form, agreeing to less than the maximum UM/UIM coverage-i.e., less than the policy's liability limit. Merdjanian claims that, although he signed such a form when he initially purchased the policy, his subsequent alteration of the policy, whereby he increased his liability coverage to $100,000/$300,000, triggered an obligation upon Nationwide to obtain a new signed confirmation that he wished to continue to waive maximum UM/UIM coverage. Merdjanian argues that, because he never signed such a form, Nationwide must provide the maximum UM/UIM coverage-i.e., the same $100,000/ $300,000 worth of coverage his policy provides for liability.

*81 IV.

Section 1731(a) of the MVFRL provides, in pertinent part:

No motor vehicle liability insurance policy shall be delivered or issued for delivery in this Commonwealth, with respect to any motor vehicle registered or principally garaged in this Commonwealth, unless uninsured motorist and underinsured motorist coverages are offered therein or supplemental thereto in amounts as provided in section 1734.... Purchase of uninsured motorist and underinsured motorist coverages is optional.

Id.

Sections 1731(b), (c), and (c.1) provide the format of specific written forms to be signed by an insured who wishes to reject UM or UIM coverage entirely, as well as certain strict formalities that must be observed in executing these forms. Section 1731(c.1) also contains a penalty for insurers who fail to secure valid UM/UIM rejection waivers: "If the insurer fails to produce a valid rejection form, uninsured or underinsured coverage, or both, as the case may be, under that policy shall be equal to the bodily injury liability limits." Id. Section 1731(c.1) is essentially a penalty default imposed upon insurers who fail to procure the proper authorization from motorists who do not wish to purchase any UM/UIM coverage. See Lewis v. Erie Ins. Exch., 568 Pa. 105, 123, 793 A.2d 143 (Pa.2002) (Section 1731(c.1) is designed to give insurers "the proper incentive to follow the legislature's prescription for avoiding uninformed choice on the part of purchasers of insurance.")

Motorists may also choose the intermediate option of purchasing UM/UIM coverage in an amount less than their liability coverage. To obtain a reduced amount of UM/UIM coverage, an insured must only request it in writing. 75 Pa.C.S.A. § 1734. Section 1734 provides:

A named insured may request in writing the issuance of coverages under section 1731 ... in amounts equal to or less than

the limits of liability for bodily injury. **3 Id.

Merdjanian's main argument is that when he increased his liability coverage to $100,000/$300,000 in 1998, Nationwide immediately became obligated to obtain a written confirmation that he wished to continue receiving UM/UIM coverage in a reduced amount. Nationwide did not do so. Merdjanian asserts that, just as failure to obtain a valid rejection form defaults UM/UIM coverage to the policy's liability limit, see id. § 1731(c.1), failure to obtain a writing confirming reduced UM/UIM coverage automatically defaults UM/UIM coverage to the limit of the policy's liability coverage.

This argument is without merit. Merdjanian's policy was issued in 1990 and continued in effect through the date of the accident in 2001. Nationwide fully complied with sections 1731 and 1734 by obtaining from Merdjanian, at the time he purchased the policy an "Uninsured Motorist Coverage Authorization Form," wherein Merdjanian agreed, in writing, to reduced UM/UIM coverage in the amount of $15,000/$30,000. Nothing in the statute requires an insurer to obtain a new writing under section 1734 each time an insured chooses to increase liability coverage or otherwise alter the policy.FN2 The statute requires only that an insurer offer UM/*82 UIM coverage in the amounts specified in 1734-i.e., in amounts less than or equal to liability coverage, and that the purchase of reduced coverage must be confirmed in writing. Id. §§ 1731, 1734.

FN2. Section 1791 of the MVFRL, which requires notice to insureds of available benefits and limits, provides that such notice must state "... payment of any renewal premium evidences your actual knowledge and understanding of the availability of these benefits and limits as well as the benefits and limits you have selected." It is significant in this regard that Merdjanian paid the renewal premiums on his policy from 1990, and particularly from 1998, through the date of the accident, without objecting to the coverages. Merdjanian's UM/UIM coverage

continued to remain the same ($15,000/$30,000) from 1990 through the date of the accident.

That changes in the amount of liability coverage do not trigger additional requirements under the MVFRL is further confirmed by the language of section 1731, which applies specifically to the " deliver[y] or issu[ance] for delivery" of a " liability insurance policy." Id. § 1731. It is therefore the initial issuance of a policy, rather than alteration of the policy's liability coverage limits, that triggers the MVFRL's requirements. It is true that section 1734 refers to "issuance of coverages." Id. § 1734. However, the Pennsylvania Supreme Court has held "that sections 1731 and 1734 should be read in pari materia." Lewis, 568 Pa. 105 at 115, 793 A.2d 143. Read together, sections 1731 and 1734 clearly impose obligations only with respect to the issuance of policies, not changes to pre-existing policies. Cf. Smith v. Hartford Ins. Co., 849 A.2d 277 (Pa.Super.Ct.2004) (holding that an increase in liability coverage does not trigger an obligation upon the insurer to obtain a new rejection of coverage form).

Merdjanian's interpretation is further undermined by section 1791 of the MVFRL, which provides:

It shall be presumed that the insured has been advised of the benefits and limits available under this chapter provided the following notice in bold print of at least ten-point type is given to the applicant at the time of application for original coverage, and no other notice or rejection shall be required:

IMPORTANT NOTICE

Insurance companies operating in the Commonwealth of Pennsylvania are required by law to make available for purchase the following benefits for you ...

**4 ....

(6) Uninsured, underinsured and bodily injury liability coverage ...

Id.

Under section 1791, once an insurance applicant has been informed of the available choices for UM/UIM coverage, and opted to reject or reduce such coverage in conformity with the requirements of sections 1731 and 1734, the insurer has no further obligation to provide notice or rejection with regard to UM/UIM coverage. Here, Nationwide provided Merdjanian with the notice prescribed by section 1791 and obtained his written application for reduced UM/UIM coverage in the amount of $15,000/$30,000. Nothing more was required.

Merdjanian cites the recent Pennsylvania Superior Court en banc decision in Blood v. Old Guard Ins. Co., 894 A.2d 795 (Pa.Super.Ct.2006) to support his contention that his altering of the policy's coverage limits obligated Nationwide to obtain a new reduction waiver. However, in Blood, the insured had been presented with a "change request form" containing sections pertaining to both liability and UM/UIM coverage. This alone distinguishes Blood from the present case. Moreover, Blood is not a decision rendered by the Supreme Court of Pennsylvania.FN3 If it were,-and if it involved facts and issues similar to those of the present case-we, of course, would be bound by its holding. It is well-established*83 that Pennsylvania inferior courts may influence our decision if we are persuaded by their analysis. We are not persuaded here that Blood requires us to rule in favor of Merdjanian.

FN3. No decision of the Pennsylvania Supreme Court has dealt with the precise issue before us.

Even if applying for an increase in liability coverage would somehow trigger an obligation on the part of an insurer to obtain a new writing confirming reduced UM/UIM coverage, there is no

basis for applying section 1731(c.1), which deals specifically with failure to obtain a valid rejection form, to the reduction context at issue here. The statute treats complete rejection of UM/UIM coverage far more stringently than reduction by specifying precise language to be included in a rejection form and by the other formalities set forth in section 1731(c.1). Section 1734, involving requests for reduced UM/UIM coverage, contains no such provisions, requiring only a "request in writing." Id. § 1734. There is therefore no basis for importing Section 1731(c.1)'s penalty relating to rejections into the reduction context.

These differences between complete rejection of UM/UIM coverage and opting for reduced coverage are consistent with the policy underlying the statute, which is to protect consumers from unknowingly waiving their UM and UIM coverage. Lewis, 568 Pa. at 123, 793 A.2d 143. The Pennsylvania Legislature, clearly more concerned about the unknowing waiver of all UM/UIM coverage than a consumer's choice to purchase only a reduced amount of such coverage, logically chose to impose the severe penalty contained in section 1731(c.1)-i.e., increasing UM/UIM coverage to the liability limits, only in the case of rejection. For these reasons, Merdjanian's claim that Nationwide must provide UM/UIM coverage in an amount greater than the $15,000/$30,000 for which he subscribed and paid premiums must be rejected.

**5 Unlike rejection, the statute contains no penalty for violation of section 1734's requirement that requests for reduction be in writing. Under well-established Pennsylvania law, we are not empowered to create one. Nationwide Mut. Ins. Co. v. Buffetta, 230 F.3d 634, 642 (3d Cir.2000); Donnelly v. Bauer, 553 Pa. 596, 608, 720 A.2d 447 (Pa.1998); Salazar v. Allstate Ins. Co., 549 Pa. 658, 702 A.2d 1038 (Pa.1997).

V.

Merdjanian also argues that there is at least a factual dispute about whether, at the April 17, 2001 meeting, he requested that Nationwide increase his UM/UIM coverage to $100,000/$300,000. Merdjanian testified that, at this meeting, he told Polidoro that he wanted "full coverage for my whole family" and that by full coverage he meant UM/UIM coverage equal to the policy's liability coverage limit. However, it is undisputed that Merdjanian did not, at any point during this conversation or thereafter, state that he desired an increase in his UM/UIM coverage. Nor did he execute the necessary forms to effect such an increase, despite the conceded fact that he received such forms from Nationwide.FN4

FN4. It is also significant that Merdjanian did not object to the Declarations Page mailed to him by Nationwide on April 23, 2001, which stated that his UM/UIM coverage remained $15,000/$30,000. Indeed, Merdjanian subsequently paid premiums for the coverage reflected in the April 23, 2001 Declarations Page.

VI.

For these reasons, we will affirm the district court's order granting Nationwide's motion for summary judgment.

C.A.3 (Pa.),2006.
Nationwide Mut. Ins. Co. v. Merdjanian
195 Fed.Appx. 78, 2006 WL 2686655 (C.A.3 (Pa.))

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1790

NATIONWIDE MUTUAL INSURANCE COMPANY

v.

ANDRE MERDJANIAN, Individually and as Administrator of the ESTATE OF SONIA T. MERDJANIAN, Deceased;
RAFFI MERDJANIAN, and ANDRE MERDJANIAN,

Appellants

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Civ.A.No. 03-5153)
District Judge: The Honorable Michael M. Baylson

Before: SLOVITER, WEIS, and GARTH, Circuit Judges

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on September 14, 2006.

On consideration whereof, it is hereby ORDERED AND ADJUDGED that the judgment of the District Court entered March 7, 2007, be, and the same is, hereby affirmed. Costs taxed

against Appellant. All of the above in accordance with the opinion of this court.

ATTEST:

(s) Marcia M. Waldron
Clerk

DATED: September 20, 2006

Certified as a true copy issued in lieu of a formal mandate on January 12, 2007

Teste: Marcia M. Waldron

Clerk, U.S. Court of Appeals for the Third Circuit.

United States District Court,
E.D. Pennsylvania.
NATIONWIDE MUTUAL INSURANCE COMPANY
v.
Andre MERDJANIAN, et al.
No. Civ.A. 03-5153.
March 4, 2005.

Kathryn A. Dux, German Gallagher & Murtagh the Bellevue, Philadelphia, PA, for Plaintiff.
William P. Marshall, Law Office of William P. Marshall, Colmar, PA, for Defendants.
Michael O. Pansini, Pansini & Mezrow, Philadelphia, PA, for Claimant.

MEMORANDUM

BAYLSON, J.

I. Introduction

*1 Plaintiff Nationwide Mutual Insurance Company ("Nationwide") brought this declaratory judgment action pursuant to 28 U.S.C. § 2201 against Defendants Andre Merdjanian, individually and as administrator of the estate of Sona T. Merdjanian, and his sons, Raffi and Hajop Merdjanian ("Merdjanian"). Nationwide asks this Court to declare that the automobile insurance policy Nationwide issued to Andre Merdjanian provides uninsured motorist and underinsured motorist coverage ("UM/UIM coverage") in the amount of $15,000 per person and $30,000 per occurrence for all uninsured motorist claims arising out of an accident on June 10, 2001. Merdjanian has filed a counterclaim seeking reformation of the Nationwide policy to reflect UM/UIM coverage of $300,000 per person and $900,000 per occurrence. Presently before the Court are the parties' cross motions for summary judgment.

I. Background

On July 16, 1990, Andre Merdjanian met with Rocco J. Polidoro, the owner of Rocco J. Polidoro Insurance Agency, an agency which sells and services Nationwide products. Andre signed an Application for Auto Insurance with Nationwide, and Nationwide subsequently issued Century II Auto Policy No. 58 37 C 645588 ("the policy") to Andre as named insured for the policy period commencing July 17, 1990. The policy provided bodily injury liability limits of $25,000 per person and $50,000 per occurrence. Andre signed an Uninsured Motorist Coverage Authorization Form dated July 17, 1990, selecting UM/UIM coverage limits of $15,000 per person and $30,000 each occurrence. Andre also signed an Uninsured Coverage Limits form dated July 17, 1990, in which he rejected stacking of UM/UIM coverage.FN1

FN1. Stacking of coverage means that the limits for each insured vehicle can be added together to pay a loss from a single accident.

On June 26, 1991, Andre contacted Polidoro to add a second vehicle to the policy. On or about August 26, 1997, Andre added yet another vehicle to the policy. At that time, the bodily injury liability coverage was increased to $100,000 per person and $300,000 per occurrence.

Nationwide asserts that on September 4, 1998, Polidoro's agency sent UM 2 and UIM 2 forms to Andre for him to sign if he wanted to change the limits of his UM/UIM coverage, and that these forms were never returned. Merdjanian alleges that he never received these forms. There is no dispute, however, that these forms were never signed by Merdjanian or returned to Polidoro or Nationwide.

On April 17, 2001, Andre met with Polidoro to make some changes to the policy, including adding a 1990 Honda to the

policy and adding one of his sons as a driver. Andre alleges that in that meeting he requested "full coverage," and that by "full coverage" he meant that the UM/UIM coverage should match the liability coverage and that UM/UIM coverage would be stacked for all three insured vehicles. Polidoro has testified that Andre did not ask to raise his UM/UIM coverage or to stack his coverage. As explained below, the Court need not address this factual dispute, if a factual dispute indeed exists between these two accounts, as the material facts relevant to the motions before the Court are not in dispute.

*2 On April 23, 2001, Nationwide issued a Declarations Page to Andre, stating bodily injury liability limits of $100,000 per person and $300,000 per occurrence and UI/UIM limits of $15,000 per person and $30,000 per occurrence. For the policy period April 17, 2001 to July 17, 2001, the policy insured three vehicles: a 1993 Mercury Grand Marquis, a 1998 Dodge Durango, and a 1990 Honda Accord.

On June 10, 2001, Andre's wife, Sona, was involved in an accident with an uninsured motorist while operating the 1998 Dodge Durango. Sona was killed and Hajop and Raffi were injured. Neither party disputes that at the time of the accident, Andre was the named insured as to three motor vehicles insured by Nationwide, each of which had liability limits of $100,000 per person and $300,000 per occurrence.

On September 12, 2003, Nationwide filed this declaratory judgment action against Merdjanian requesting this Court to declare that the policy provided UM/UIM coverage in the amount of $15,000 per person and $30,000 per occurrence for all uninsured motorist claims arising out of an accident on June 10, 2001. On May 5, 2004, Merdjanian filed a counterclaim seeking reformation of the Nationwide policy to reflect UM/UIM coverage of $300,000 per person and $900,000 per occurrence.

On November 5, 2004, both parties filed motions for summary

judgment. On November 29, 2004, Nationwide filed an amended memorandum of law in support of its motion, and on December 21, 2004, both parties filed responses. On January 5, 2005, Merdjanian filed a reply brief, citing to a Pennsylvania Superior Court decision, Blood v. Old Guard Ins. Co., 2004 WL 3017068 (Pa.Super.Ct. Dec. 30, 2004), decided after the initial briefing was complete. The Court therefore afforded Nationwide an opportunity to file a brief responding to Merdjanian's arguments regarding Blood, which was filed with the Court on January 24, 2005. The Court then heard oral argument on the motions on February 10, 2005.

II. Summary of Parties' Contentions

A. Merdjanian's Contentions

Merdjanian first contends that Nationwide must provide UM/UIM coverage to the Merdjanians in the amount of $100,000 per person and $300,000 per occurrence because Pennsylvania's Motor Vehicle Financial Responsibility Law ("MVFRL") requires that an insurer provide UM/UIM coverage in an amount equal to the liability coverage unless a "sign-down" form is signed by the insured. 75 Pa. Cons.Stat. Ann. § 1731 (Purdon 1999). Merdjanian relies on the recent Superior Court opinions of Blood v. Old Guard Ins. Co., 2004 WL 3017068 (Pa.Super.Ct. Dec. 30, 2004)(Judge Joyce, dissenting), and Smith v. Hartford Ins. Co., 849 A.2d 277 (Pa.Super. April 27, 2004), to argue that when the policy's liability limits were increased in 1997, the fact that Andre did not sign a new sign-down form reducing the UM/UIM coverage means that Nationwide must provide that coverage in amounts equal to the liability coverage.

*3 Merdjanian also argues that Nationwide is obligated to stack the coverage of the three vehicles insured by Nationwide on the date of the accident, June 10, 2001, thus making the total coverage $300,000 per person and $900,000 per occurrence. Although Andre executed a waiver of stacking form for

UM/UIM coverage in 1990 when he had only one vehicle insured under the policy with Nationwide, Merdjanian contends that Pennsylvania law does not allow stacking to be waived by a named insured who owns only one vehicle, In re Insurance Stacking Litigation, 754 A.2d 702 (Pa.Super.Ct.2000), appeal den'd sub nom In re Leed, 565 Pa. 673, 775 A.2d 807 (2001) ("Stacking Litigation"), and instead requires that the opportunity to waive stacking be afforded when "more than one" vehicle is insured under the policy, 75 Pa. Cons.Stat. Ann. § 1738(a)-(c). Therefore, Merdjanian argues, Nationwide's failure to provide Merdjanian with the opportunity to waive stacking when he added an additional vehicle to the policy on June 26, 1991, means that stacking of the policy's coverage should be permitted.

B. Nationwide's Contentions

Nationwide argues that the MVFRL does not impose a requirement on insurers to obtain new written requests for lower UM/UIM coverage whenever there is a change in the liability coverage, and there already exists a valid written request for UM/UIM coverage at $15,000 per person and $30,000 per occurrence, signed by Andre in 1990 when he purchased the policy. Nationwide also relies on the fact that Andre did not attempt to correct any alleged mistake in the coverage when the Declarations Page was sent to him on April 23, 2001.

Similarly, regarding stacking of coverage, Nationwide contends that because Andre signed a waiver/rejection of stacked coverage at the time the policy was initially purchased, Nationwide had no obligation to obtain new waiver/rejection forms when changes were made to the policy. Nationwide argues that Merdjanian had knowledge from the inception of the policy of his option to reject stacked coverage, and he received premium savings by rejecting stacking. Nationwide relies on an argument that, although the Pennsylvania Superior Court made statements in Stacking Litigation to the effect that only named insureds who purchase coverage for more than one vehicle under a policy may waive

stacking of UM/UIM coverage, these statements are dicta and the language of the MVFRL does not prohibit an insurer from offering an opportunity to waive stacking when only a single vehicle is insured, and if an insured with one vehicle, such as Merdjanian, rejects stacking, that rejection is binding if the insured subsequently acquires a second vehicle.

III. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

*4 "Disposition of an insurance action on summary judgment is appropriate, when, as here, there are no material underlying facts in dispute." McMillan v. State Mutual Life Assurance Co. of Am., 922 F.2d 1073, 1074 (3d Cir.1990).

IV. Discussion

A. UM/UIM Coverage Does Not Equal Liability Coverage Under the Facts of the Case

Section 1731(a) of the Motor Vehicle Financial Responsibility Law (MVFRL) provides that:

No motor vehicle liability insurance policy shall be delivered or issued for delivery in this Commonwealth ... unless uninsured motorist and underinsured motorist coverages are offered therein or supplemental thereto in amounts as provided in section 1734

(relating to request for lower limits of coverage). Purchase of uninsured motorist and underinsured motorist coverages is optional.

75 Pa. Cons.Stat. Ann. § 1731(a). Section 1731(c.1) states that "[i]f the insurer fails to produce a valid rejection form, uninsured or underinsured coverage, or both, as the case may be, under that policy shall be equal to the bodily injury liability limits." 75 Pa. Cons.Stat. Ann. § 1731(c.1). Section 1734 provides that "[a] named insured may request in writing the issuance of coverages under section 1731 (relating to the availability, scope and amount of coverage) in amounts equal to or less than the limits of liability for bodily injury." 75 Pa. Cons.Stat. Ann. § 1734.

In the Blood opinion relied upon by Merdjanian, the Superior Court majority summarized the requirements of the MVFRL thus:

The Motor Vehicle Financial Responsibility Law (MVFRL) directs that motor vehicle liability insurance polices may not be issued in this Commonwealth unless UM/UIM coverage is offered. 75 Pa .C.S.A. § 1731(a).

Insureds must be notified of the option to reject such coverage and may choose to do so upon signing a specific rejection form. 75 Pa.C.S.A. § 1731(b) and (c).

Absent a valid rejection, the MVFRL requires insurance companies to provide UM/UIM coverage in amounts equal to the bodily injury liability coverage purchased under the policy. 75 Pa.C.S.A. § 1731(c .1).

An insured may elect, in writing, to purchase UM/UIM coverage in an amount less than the limits of liability coverage. 75 Pa.C.S.A. § 1731(c.1) and 1734.

However, when an insured person elects to purchase UM/UIM

coverage in an amount lower than the liability limits, the insured must affirmatively request the lower amount in writing. 75 Pa.C.S.A. § 1734, and Smith v. The Hartford Ins. Co., 849 A.2d 277 (Pa.Super.2004).

In contrast to the forms set forth in § 1731(a) and (b) for the outright rejection of UM/UIM coverage, no specific written format is prescribed by the statute for electing to reduce the amount of UM and UIM coverage.

However, a request for lower coverage limits requires the signature of the insured, and an express designation of the amount of coverage requested. Lewis v. Erie Ins. Exch., 568 Pa. 105, 793 A.2d 143, 153 (2002).

*5 2004 WL 3017068 at *2 (paragraph breaks added for clarity).

In Blood, the insureds (as Merdjanian in this case) had signed an election opting to lower UM/UIM coverage when they first purchased their insurance policy in 1986. Id. at *1. Subsequently, in 2000, the insureds in Blood reduced their liability coverage but did not make any marks on the change request form regarding UM/UIM coverage, and the insurer did not obtain any alternate election of reduced UM/UIM coverage. The Blood court held that the election to reduce UM/UIM coverage signed by the insureds when they first purchased their policy did not apply to the policy after the insureds had reduced their liability coverage. Thus, the Blood court held, under the statute, the UM/UIM coverage was, as a matter of law, equal to the liability coverage.

The Blood majority relied on the Superior Court's distinction in Smith, 849 A.2d 277, between cases in which UM/UIM coverage was waived and such waiver "carries forward throughout the lifetime of the policy, unless affirmatively changed," as opposed to "a 'sign-down' case, where an insured elects UM/UIM coverage in an amount lower than the liability limits." Blood,

2004 WL 3017068 at *3 (citing Smith, 849 A.2d at 281). "[W]here an insured in a sign-down case later seeks to change the amount of bodily injury liability coverage, a new request for lower limits of UM/UIM coverage must be submitted or the statutorily mandated equal limits will apply." Id.

Blood cites with approval Smith' s reasoning that "[b]ecause the statutory provisions so entwine the relationship between the amount of liability coverage and UM/UIM coverage, a 'sign-down' case differs from a case involving an outright rejection of UM/UIM coverage, and requires an insured to execute a new affirmative request for lower limits." Id. In Blood, the majority concluded that because "no rejection form was ever executed and because [the insurer] failed to obtain an alternate selection for UM/UIM coverage, the UIM coverage under the insureds' policy 'shall be equal to the bodily injury liability limits." ' Id.

Here, Merdjanian initially elected UM/UIM coverage lower than the liability coverage. Although there is a factual dispute as to Merdjanian's oral exchange with the insurance agent at the time he increased his liability coverage, neither party disputes that Merdjanian never executed another "sign-down" after he raised the policy's liability limits. The facts before the Court are therefore similar to those before the Superior Court in Blood, but are materially different from Smith.

This Court concludes that the Blood majority mistakenly relied on dicta from Smith and that, on the facts before the Court here, the Pennsylvania Supreme Court would decide otherwise. In applying Pennsylvania law this Court "must predict how the Pennsylvania Supreme Court would determine unresolved question of substantive law." Employers Fire Ins. Co. v. Alvarado, 2005 WL 182717 (E.D.Pa.2005)(citing Borman v. Raymark Indus., Inc., 960 F.2d 327, 331 (3d Cir.1992)). Decisions of the Superior Court, while accorded significant weight in determining what the state's highest court would

decide, are not dispositive. Id. (quoting Horowitz v. Federal Kemper Life Assurance Co., 57 F.3d 300, 304 (3d Cir.1995)("The decisions of Pennsylvania Superior and Commonwealth Courts, although not dispositive, 'should be accorded significant weight in the absence of an indication that the highest state court would rule otherwise." ')).FN2

FN2. The Court notes that, although direction from the Pennsylvania Supreme Court in this murky area of state law would be dispositive, only the United States Supreme Court or Court of Appeals may file a certification petition to the Pennsylvania Supreme Court. 210 Pa.Code § 63.10.

*6 The Court agrees instead with the dissenting opinion of Judge Joyce in Blood that a new written request to reduce UM/UIM coverage was not required when the policy's liability limits were changed (in this case, increased). 2004 WL 3017068 *4. As Judge Joyce explains, the reasoning from Smith relied upon in Blood is dicta, since the facts in Smith involved waiver of UM/UIM coverage, not reduction. Id. at *7. In Smith, the Superior Court in fact rejected an argument parallel to that made by Merdjanian here and reasoned that when the insureds had signed a waiver of UM/UIM coverage, a subsequent change in the liability limits of the policy did not require a second waiver of UM/UIM coverage, because "the previous election form is presumed to be in effect throughout the lifetime of the policy." Id. at *5.

The other case cited by the majority in Blood as representative of the general proposition that a change in liability limits requires a new request for reduced UM/UIM limits- Cebula v. Royal & SunAlliance Ins. Co., 158 F.Supp.2d 455 (M.D.Pa.2001)-is also distinguishable from the facts here. The insured in Cebula never requested a reduction in uninsured motorist coverage. Here, there is no dispute that a written request for reduction in UM/UIM coverage was signed by Merdjanian at the inception of the policy. Therefore, as Judge Joyce's dissent in Blood concludes,

"the proposition set forth in Smith, which cites Cebula, is not only dicta but distinguishable, and we are not bound by it." Blood, 2004 WL 3017068 *6.

As noted above, the holding in Smith correctly established that when a policy is modified by a change in liability limits, the insurer is not required to provide a new rejection of UM/UIM coverage. It would therefore be "illogical to require a new affirmation to purchase a reduction of UM/UIM coverage." Id. at *7. This Court therefore concludes that, if faced with the facts of before the Court here, the Pennsylvania Supreme Court would draw the logical conclusion from the holding, and not the dicta, in Smith that "[o]nce an insured has elected, in writing, to either reject or reduce UM/UIM coverage, that decision remains in effect until the insured indicates otherwise in writing pursuant to general contract principles." Id. at *7.

While there is no Pennsylvania Supreme Court jurisprudence directly on point, the approach to statutory interpretation of the MVFRL recently taken by the Pennsylvania Supreme Court in Lewis v. Erie Insurance Exchange, 568 Pa. 105, 793 A.2d 143 (Pa.2002), indicates that the Supreme Court's reading of the relevant provisions of the MVFRL would not support the majority's holding in Blood. In Lewis, the Supreme Court held that the technical prescriptions regarding rejection of UM/UIM coverage-specifically that such rejection must involve separate sheets of paper-did not apply to reductions of UM/UIM coverage.

*7 The Lewis court considered the plain language of the MVFRL within the context of the policies underlying the MVFRL, particularly the legislature's effort to contain insurance costs. The court concluded that "[w]hile cost containment is not the only objective of the statute, it has become an increasingly significant one, and it is apparent that the General Assembly has been employing the vehicle of free consumer choice with greater latitude and frequency in furtherance of this objective." Id. at

123, 793 A.2d 143.

Section 1734 states that "[a] named insured may request in writing an issuance of coverages under 1731 ... in amounts equal to or less than the limits of liability for bodily injury." 75 Pa. Cons.Stat. Ann. § 1734. Merdjanian exercised his right to reduced UM/UIM coverage under this section of the statue. The decision of the General Assembly to allow insureds to elect reduced UM/UIM coverage and therefore reduce premiums furthered its objective of containing insurance costs. The Blood majority concluded, however, that, despite the fact that the insureds had elected reduced UM/UIM coverage in order to reduce their premiums, § 1731 (c .1) required that UM/UIM coverage equal liability limits "[b]ecause no rejection form was ever executed and because [the insurer] failed to obtain an alternate selection for UM/UIM coverage." Blood, 2004 WL 3017068 at *3. The plain language of § 1731(c.1), however, only requires that "[i]f the insurer fails to produce a valid rejection form, uninsured or underinsured coverage ....shall be equal to the bodily injury liability limits." 75 Pa. Cons.Stat. Ann. § 1731(c.1). There is no indication in the plain language of the MVFRL that the failure to execute an additional request for reduced UM/UIM coverage after a modification of the policy's liability limits should make UM/UIM coverage equal to liability limits. Indeed, § 1734 only states that "[a] named insured may request in writing an issuance of coverages under 1731 ... in amounts equal to or less than the limits of liability for bodily injury." 75 Pa. Cons.Stat. Ann. § 1734. The Blood majority's creation of a requirement of an additional election of reduced UM/UIM coverage, after a modification in the policy's liability limits, does not further the MVFRL's policy objective of containing insurance costs by allowing consumer choices that result in reduced premiums.

Merdjanian signed an election to reduce UM/UIM coverage to $15,000 per person and $30,000 per occurrence at the inception of the policy, in order to reduce his premiums, and he continued

to pay reduced premiums on the basis of that reduction of UM/UIM coverage for the life of the policy. To adopt Merdjanian's interpretation would give him an economic windfall not mandated by the MVFRL and inconsistent with the statute's goals of cost containment. The Court finds that the subsequent modification of the policy to increase the liability limits did not impose a requirement on Nationwide to obtain an additional election of reduced UM/UIM coverage. Therefore, Nationwide must only provide UM/UIM coverage to the Merdjanians in the amount of $15,000 per person and $30,000 per occurrence for all uninsured motorist claims arising out of an accident on June 10, 2001.

B. Stacking-Waiver of Stacking Signed When Only One Vehicle Was Insured Is Not Valid Throughout Life of Policy After Additional Vehicles are Added

*8 The statutory language of the MVFRL requires that "[e]ach named insured purchasing uninsured or underinsured motorist coverage for more than one vehicle under a policy shall be provided the opportunity to waive the stacked limits of coverage." 75 Pa. Cons.Stat. Ann. § 1738(c)(emphasis added). As discussed above, Merdjanian's motion relies on language from In re Insurance Stacking Litigation, 754 A.2d 702 (Pa.Super.2000), appeal den'd sub nom In re Leed, 565 Pa. 673, 775 A.2d 807 (2001) ("Stacking Litigation"), in which the Pennsylvania Superior Court interpreted § 1738 of the MVFRL to indicate that "only named insureds who purchase coverage for more than one vehicle under a policy may waive the stacking of uninsured or underinsured benefits." 754 A.2d 702. Merdjanian thus argues that the waiver of stacking form that he signed at the inception of his policy, when he purchased coverage for only one vehicle, is invalid.

The issue in Stacking Litigation was whether insurers were required to inform named insureds purchasing coverage for only one vehicle of the opportunity to waive stacking. The court

analyzed the language of § 1738 and determined that the legislature's decision to limit the class of those to whom the opportunity to waive must be provided to those insuring "more than one vehicle" "suggests that the legislature only intended to allow named insureds who have more than one vehicle insured under a policy to waive stacking." Id. at 708.

The court reasoned that "by confining the class of those who can waive stacking to named insureds who purchase coverage for more than one vehicle under a single policy, it appears that the legislature has expressed a clear preference in favor of stacking." Id. at 709.

All those who are insured in Pennsylvania pay for this privilege, via increased rates for uninsured or underinsured motorist benefits, except for those who are permitted to waive stacking under section 1738(b). In this manner, the risk and cost associated with stacking is shared by all who purchase insurance, except for those who exercise their option to waive, and thereby helps to maintain premiums at a more affordable level.

Id. The court found this interpretation to be supported by a statement in the legislative history by Representative George Saurman that "all the ones who have only one car are going to subsidize that." Id. (quoting Legislative Journal of the House, Vol. I, No 10 at 209 (February 7, 1990)). The court found that, although this was the only such statement, it suggested that "the legislature contemplated that those individuals who purchase coverage for only one car will pay increased premiums to help subsidize the higher costs associated with Pennsylvania's virtually mandatory stacking policy." Id.

While Stacking Litigation' s reasoning is arguably dicta, Pennsylvania state courts have cited approvingly to Stacking Litigation and its interpretation of § 1738 as limiting the class of insureds who can waive stacking. In Nationwide Mutual Ins. Co. v. Harris, 826 A.2d 880, 884 (Pa.Super.2003), a case involving

inter-policy stacking, the Superior Court cited to Stacking Litigation and referred to the right to waive stacking as "a statutorily created right, which only named insureds who have multiple vehicles insured under a single policy may waive." The Superior Court again applied the reasoning of Stacking Litigation in State Farm Automobile Ins. Co. v. Rizzo, 835 A.2d 359, (Pa.Super.2003), where the court found that despite the fact that the insureds had paid reduced premiums based on their election to waive stacking, "their election was void ab initio and therefore unenforceable because it conflicted with the provisions of § 1738 as this court has interpreted it."

*9 Applying the Stacking Litigation court's analysis to the facts of this case, we find that daughter and father could not waive stacking because neither insured more than one vehicle under a policy (intra-policy stacking); in fact, neither possessed more than one vehicle, the very situation the Stacking Litigation court addressed. Thus, despite the fact that State Farm apparently reduced insureds' premiums for their purported 'election' to waive stacking, their election was void ab initio and therefore unenforceable because it conflicted with the provisions of § 1738 as this court has interpreted it.

Id. (citations omitted). In State Farm Fire and Casualty v. Craley, 844 A.2d 573, 575-76 (Pa.Super.2004), the Superior Court criticized the outcome of Rizzo' s adoption of other aspects of Stacking Litigation regarding intra-policy versus inter-policy stacking, but did not address Stacking Litigation' s limitation of waiver to insureds purchasing coverage for more than one vehicle.

So, although the language relied upon by Merdjanian is arguably dicta, the reasoning behind Stacking Litigation' s interpretation of § 1738 has not been questioned by Pennsylvania courts and has been applied consistently to limit those who may waive stacking to insureds purchasing coverage for more than one vehicle. The waiver signed by Merdjanian when he was

purchasing coverage for only one vehicle is therefore invalid under the MVFRL, and Nationwide does not dispute that no subsequent stacking waiver form was ever signed by Merdjanian after he added a second vehicle to his policy. Thus, Nationwide is obligated to stack the coverage of all vehicles insured by Nationwide under the policy on the date of the accident.

C. Conclusion

Based on the foregoing, the Court finds that Nationwide must provide UM/UIM coverage to the Merdjanians in the amount of $15,000 per person and $30,000 per occurrence for all uninsured motorist claims arising out of an accident on June 10, 2001, and that Nationwide is obligated to stack the coverage of all vehicles insured by Nationwide on the date of the accident, June 10, 2001. Both plaintiff's and defendants' motions for summary judgment are therefore granted in part and denied in part.

An appropriate Order follows.

ORDER

AND NOW, this 4 day of March, 2005, upon consideration of the Cross Motions for Summary Judgment, and the responses thereto, it is ORDERED that the Motion for Summary Judgment of Plaintiff Nationwide Mutual Insurance Company is GRANTED and Plaintiff must provide UM/UIM coverage to the Defendants in the amount of Fifteen Thousand Dollars ($15,000) per person and Thirty Thousand Dollars ($30,000) per occurrence for all uninsured motorists claims arising out of an accident on June 10, 2001. The Motion for Summary Judgment of Defendants is GRANTED in part and Plaintiff is obligated to stack the coverage of all vehicles insured by Plaintiff on the date of the accident, June 10, 2001. All other claims by Plaintiff and Defendants are DENIED.

The Clerk is directed to close this case.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1790

NATIONWIDE MUTUAL INSURANCE COMPANY

v.

ANDRE MERDJANIAN, Individually and as Administrator of the ESTATE OF SONIA T. MERDJANIAN, Deceased;
RAFFI MERDJANIAN, and ANDRE MERDJANIAN,

Appellants

Before: SLOVITER, WEIS and GARTH, Circuit Judges

SUR PETITION FOR PANEL REHEARING

The petition for panel rehearing filed by appellant, Andre Merdjanian, having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is DENIED.

BY THE COURT:

(s) Leonard I. Garth

DATED: January 4, 2007
SLC/cc: William P. Marshall, Esquire
Steven M. Mezrow, Esquire
Michael O. Pansini, Esquire
Kathryn A. Dux, Esquire

75 Pa.C.S.A. § 1731

Purdon's Pennsylvania Statutes and Consolidated Statutes Annotated
§ 1731. Availability, scope and amount of coverage

(a) Mandatory offering.--No motor vehicle liability insurance policy shall be delivered or issued for delivery in this Commonwealth, with respect to any motor vehicle registered or principally garaged in this Commonwealth, unless uninsured motorist and underinsured motorist coverages are offered therein or supplemental thereto in amounts as provided in section 1734 (relating to request for lower limits of coverage). Purchase of uninsured motorist and underinsured motorist coverages is optional.

(b) Uninsured motorist coverage.--Uninsured motorist coverage shall provide protection for persons who suffer injury arising out of the maintenance or use of a motor vehicle and are legally entitled to recover damages therefor from owners or operators of uninsured motor vehicles. The named insured shall be informed that he may reject uninsured motorist coverage by signing the following written rejection form:

REJECTION OF UNINSURED MOTORIST PROTECTION

By signing this waiver I am rejecting uninsured motorist coverage under this policy, for myself and all relatives residing in my household. Uninsured coverage protects me and relatives living in my household for losses and damages suffered if injury is caused by the negligence of a driver who does not have any insurance to pay for losses and damages. I knowingly and voluntarily reject this coverage.

.....
Signature of First Named Insured
.....

(b.1) Limitation of rejection.--Uninsured motorist protection may be rejected for the driver and passengers for rental or lease vehicles which are not otherwise common carriers by motor vehicle, but such coverage may only be rejected if the rental or lease agreement is signed by the person renting or leasing the vehicle and contains the following rejection language:

REJECTION OF UNINSURED MOTORIST PROTECTION

I am rejecting uninsured motorist coverage under this rental or lease agreement, and any policy of insurance or self-insurance issued under this agreement, for myself and all other passengers of this vehicle. Uninsured coverage protects me and other passengers in this vehicle for losses and damages suffered if injury is caused by the negligence of a driver who does not have any insurance to pay for losses and damages.

(b.2) Rejection language change.--The rejection language of subsection (b.1) may only be changed grammatically to reflect a difference in tense in the rental agreement or lease agreement.

(b.3) Vehicle rental services.--The requirements of subsection (b.1) may be met in connection with an expedited vehicle rental service, which service by agreement of the renter does not require the renter's signature for each rental, if a master enrollment or rental agreement contains the rejection language of subsection (b.1) and such agreement is signed by the renter.

(c) Underinsured motorist coverage.–Underinsured motorist coverage shall provide protection for persons who suffer injury arising out of the maintenance or use of a motor vehicle and are legally entitled to recover damages therefor from owners or operators of underinsured motor vehicles. The named insured shall be informed that he may reject underinsured motorist

coverage by signing the following written rejection form:

REJECTION OF UNDERINSURED MOTORIST PROTECTION

By signing this waiver I am rejecting underinsured motorist coverage under this policy, for myself and all relatives residing in my household. Underinsured coverage protects me and relatives living in my household for losses and damages suffered if injury is caused by the negligence of a driver who does not have enough insurance to pay for all losses and damages. I knowingly and voluntarily reject this coverage.

.....

Signature of First Named Insured

.....

Date

(c.1) Form of waiver.--Insurers shall print the rejection forms required by subsections (b) and (c) on separate sheets in prominent type and location. The forms must be signed by the first named insured and dated to be valid. The signatures on the forms may be witnessed by an insurance agent or broker. Any rejection form that does not specifically comply with this section is void. If the insurer fails to produce a valid rejection form, uninsured or underinsured coverage, or both, as the case may be, under that policy shall be equal to the bodily injury liability limits. On policies in which either uninsured or underinsured coverage has been rejected, the policy renewals must contain notice in prominent type that the policy does not provide protection against damages caused by uninsured or underinsured motorists. Any person who executes a waiver under subsection (b) or (c) shall be precluded from claiming liability of any person based upon inadequate information.

(d) Limitation on recovery.--

(1) A person who recovers damages under uninsured motorist coverage or coverages cannot recover damages under underinsured motorist coverage or coverages for the same accident.
(2) A person precluded from maintaining an action for noneconomic damages under section 1705 (relating to election of tort options) may not recover from uninsured motorist coverage or underinsured motorist coverage for noneconomic damages.

CREDIT(S)

1984, Feb. 12, P.L. 26, No. 11, § 3, effective Oct. 1, 1984. Amended 1984, Feb. 12, P.L. 53, No. 12, § 3, effective Oct. 1, 1984; 1990, Feb. 7, P.L. 11, No. 6, § 9, effective July 1, 1990; 1994, Dec. 28, P.L. 1441, No. 170, § 2, effective in 60 days; 1994, Dec. 28, P.L. 1450, No. 172, § 4, effective in 60 days; 1995, July 6, P.L. 246, No. 30, § 2.

75 Pa.C.S.A. § 1734

Purdon's Pennsylvania Statutes and Consolidated Statutes Annotated

§ 1734 - Request for lower limits of coverage

A named insured may request in writing the issuance of coverages under section 1731 (relating to availability, scope and amount of coverage) in amounts equal to or less than the limits of liability for bodily injury.

CREDIT(S)

1984, Feb. 12, P.L. 26, No. 11, § 3, effective Oct. 1, 1984. Amended 1990, Feb. 7, P.L. 11, No. 6, § 11, effective July 1, 1990.

28 U.S.C.A. § 1254

United States Code Annotated Currentness
§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 928; June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat. 662.)

28 U.S.C.A. § 1332

United States Code Annotated
§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;
(2) citizens of a State and citizens or subjects of a foreign state;
(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title--

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the

insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and (2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection--

(A) the term "class" means all of the class members in a class action;
(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;
(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and
(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which--

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign

state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of--

(A) whether the claims asserted involve matters of national or interstate interest;
(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)--

(A)(i) over a class action in which--
(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which

the action was originally filed;
(II) at least 1 defendant is a defendant--
(aa) from whom significant relief is sought by members of the plaintiff class;
(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and
(cc) who is a citizen of the State in which the action was originally filed; and
(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and
(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or
(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which--

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or
(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal

jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim--

(A) concerning a covered security as defined under 16(f)(3) [FN1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));
(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or
(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action"

means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which--

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;
(II) the claims are joined upon motion of a defendant;
(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or
(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply--

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or
(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass

action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub.L. 94-583, § 3, 90 Stat. 2891; Nov. 19, 1988, Pub.L. 100-702, Title II, §§ 201(a), 202(a), 203(a), 102 Stat. 4646; Oct. 19, 1996, Pub.L. 104-317, Title II, § 205(a), 110 Stat. 3850; Feb. 18, 2005, Pub.L. 109-2, § 4(a), 119 Stat. 9.)

[FN1] So in original. Reference to "16(f)(3)" probably should be preceded by "section".

FILED
MAY 11 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1351

IN THE

Supreme Court of the United States

ANDRE MERDJANIAN, Individually and as Administrator of the ESTATE OF SONIA T. MERDJANIAN, Deceased, RAFFI MERDJANIAN and ANDRE MERDJANIAN,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition and review the decision of the Court of Appeals of the Third Circuit wherein, in affirming summary judgment in favor of Respondent, Nationwide Mutual Insurance Company, the Court of Appeals for the Third Circuit analyzed, factually distinguished and was not persuaded by a decision of the Pennsylvania Superior Court, an intermediate appellate court, which involved the same issue but involved materially different facts.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Nationwide Mutual Insurance Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1 – 9) is unreported and is not precedential. The opinion may be found at 195 Fed. Appx. 78 and 2005 U.S. App. LEXIS 23902.

The Opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. App. 12 – 27) is unreported. The opinion may be found at 2005 U.S. Dist. LEXIS 3493.

STATUTES INVOLVED

75 Pa. C.S.A. § 1791 (West 2006)

Purdon's Pennsylvania Statutes and Consolidated Statutes Annotated

§ 1791. Notice of available benefits and limits

It shall be presumed that the insured has been advised of the benefits and limits available under this chapter provided the following notice in bold print of at least ten-point type is given to the applicant at the time of application for original coverage, and no other notice or rejection shall be required:

IMPORTANT NOTICE

Insurance companies operating in the Commonwealth of Pennsylvania are required by law to make available for purchase the following

benefits for you, your spouse or other relatives or minors in your custody or in the custody of your relatives, residing in your household, occupants of your motor vehicle or persons struck by your motor vehicle:

(1) Medical benefits, up to at least $ 100,000.

(1.1) Extraordinary medical benefits, from $ 100,000 to $ 1,100,000 which may be offered in increments of $ 100,000.

(2) Income loss benefits, up to at least $ 2,500 per month up to a maximum benefit of at least $ 50,000.

(3) Accidental death benefits, up to at least $ 25,000.

(4) Funeral benefits, $ 2,500.

(5) As an alternative to paragraphs (1), (2), (3) and (4), a combination benefit, up to at least $ 177,500 of benefits in the aggregate or benefits payable up to three years from the date of the accident, whichever occurs first, subject to a limit on accidental death benefit of up to $ 25,000 and a limit on funeral benefit of $ 2,500, provided that nothing contained in this subsection shall be construed to limit, reduce, modify or change the provisions of section 1715(d) (relating to availability of adequate limits).

(6) Uninsured, underinsured and bodily injury liability coverage up to at least $ 100,000 because of injury to one person in any one accident and up to at least $ 300,000 because of injury to two or more persons in any one accident or, at the option of the insurer, up to at least $ 300,000 in a single limit for these coverages, except for policies issued under the Assigned Risk Plan. Also, at least $ 5,000 for damage to property of others in any one accident.

Additionally, insurers may offer higher benefit levels than those enumerated above as well as additional benefits. However, an insured may elect to purchase lower benefit levels than those enumerated above.

Your signature on this notice or your payment of any renewal premium evidences your actual knowledge and understanding of the availability of these benefits and limits as well as the benefits and limits you have selected.

If you have any questions or you do not understand all of the various options available to you, contact your agent or company.

If you do not understand any of the provisions contained in this notice, contact your agent or company before you sign.

28 U.S.C.S. § 1652 (West 1994)

United States Code Annotated

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

Nationwide Mutual Insurance Company ('Nationwide") brought this action in the District Court seeking declaratory judgment pursuant to 28 U.S.C.A. § 2201. The jurisdiction of the District Court was based on diversity of citizenship and amount in controversy pursuant to 28 U.S.C.A. § 1332.

Summary judgment was granted to Nationwide on the issue of the effect of a written election of lower limits of uninsured motorist benefits signed by Petitioner Andre Merdjanian when the Nationwide policy of automobile insurance was issued to him in 1990. The District Court found that Nationwide was not required to obtain a new written request for lower limits when Andre Merdjanian increased his bodily injury liability limits in 1998. The Third Circuit Court of Appeals affirmed the decision.

In July 1990, Petitioner Andre Merdjanian met with Rocco J. Polidoro, the owner of an agency that sells and services Nationwide products, and signed an Application for

Auto Insurance. In that application, Mr. Merdjanian requested bodily injury liability coverage limits of $25,000 each person and $50,000 each occurrence. [Pet. App. 13]. He also requested in the application uninsured and underinsured motorist coverage limits of $15,000 each person and $30,000 each occurrence. At the time of the application in July 1990, Mr. Merdjanian also signed an Uninsured Motorist Coverage Authorization Form selecting limits of $15,000 each person and $30,000 each occurrence. [Pet. App. 1, 13]. Mr. Merdjanian was provided with the notice prescribed by section 1791 of the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa. C.S.A. § 1791, advising of the benefits and limits available. [Pet. App. 7].

Subsequent to the issuance of the policy in 1990, Mr. Merdjanian made changes to the policy, including to add or replace vehicles. [Pet. App. 1, 2]. In August 1998, Mr. Merdjanian increased the bodily injury liability limits from $25,000 each person and $50,000 each occurrence to $100,000 each person and $300,000 each occurrence. [Pet. App. 1]. The Polidoro Agency sent two forms, UM 2 and UIM 2, to Mr. Merdjanian in September 1998 for him to sign if he wanted to change his uninsured or underinsured motorist coverage. [Pet. App. 13]. The forms were never signed by Mr. Merdjanian or returned to Polidoro or Nationwide. [Pet. App. 13]. Mr. Merdjanian contended before the District Court that he never received the forms. [Pet. App. 13]. In the Petition, Petitioners contend, with no record support, that the forms were received and not signed "because he did not want his UM/UIM limits to be less than his liability limits of $100,000 each person and $300,000 each occurrence". [Pet. 6].

On April 17, 2001, Mr. Merdjanian met with Rocco Polidoro to make changes including adding a Honda and adding one of his sons as a driver. [Pet. App. 14]. Mr. Merdjanian contended that in the meeting he requested "full coverage". [Pet. App. 14]. On April 23, 2001, Nationwide issued a Declarations Page to Andre Merdjanian stating bodily injury liability limits of $100,000 each person and $300,000 each occurrence and uninsured and underinsured motorist limits of $15,000 each person and $30,000 each occurrence. [Pet. App. 2]

On June 10, 2001, Andre Merdjanian's wife, Sona, was involved in an accident with an uninsured motorist while operating one of the vehicles listed on the Nationwide policy. [Pet. App. 14]. Sona Merdjanian died as a result of the accident. [Pet. App. 14]. The sons, Hagop and Raffi Merdjanian, were passengers at the time of the accident.

Petitioners sought uninsured motorist coverage benefits from Nationwide for the June 10, 2001 accident and claimed that the limits of uninsured motorist coverage should be the same as the bodily injury liability limits of $100,000/$300,000 because Nationwide did not obtain a new election of lower limits after the bodily injury liability limits were increased in 1998.

It is not disputed that the Nationwide auto policy included bodily injury liability limits of $100,000/$300,000 and uninsured motorist coverage limits of $15,000/$30,000 from August 1998 through the time of the motor vehicle accident of June 10, 2001. Nationwide sent out to Mr. Merdjanian, Declarations Pages reflecting these coverages, including a Declarations Page sent before the accident of June 10, 2001 which reflected the changes made after the April 2001 meeting. [Pet. App. 9]. Mr. Merdjanian paid the premium based on the coverage amounts shown in the Declarations Page. [Pet. App. 9].

REASONS FOR DENYING THE PETITION

Petitioners have not come forward with any compelling reason for this Court to review the decision of the Third Circuit Court of Appeals. The only reason advanced in the Petition is Petitioners' view that the Third Circuit's decision is in direct conflict with Pennsylvania law. The Pennsylvania law that is cited by Petitioners is the decision by the Pennsylvania Superior Court in *Blood v. Old Guard Insurance Co.*, 894 A.2d 795 (Pa. Super. 2006), *petition for allowance of appeal granted.* The opinion of an intermediate appellate state court is "a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. AT&T Co.*, 311 U.S. 233, 237, 61 S. Ct. 179, 85 L. Ed. 139 (1940).

The Third Circuit Court did not disregard the Pennsylvania Superior Court's opinion in *Blood.* To the contrary, the Third Circuit Court distinguished *Blood* factually and further stated that it was not persuaded that *Blood* required the Court to rule in favor of Merdjanian. [Pet. App. 7].

In *Blood*, Michael and Sharon Blood, the named insureds under an automobile insurance policy issued by Old Guard Insurance Company, signed an election of lower uninsured and underinsured motorist coverage (UM/UIM) requesting $35,000 per occurrence with stacking when they applied for the insurance in 1986. The liability coverage they requested at the time of the application was $500,000. In June 2000, the Bloods signed a change request form provided by Old Guard indicating by check mark a request for a reduction of the liability coverage to $300,000. The form included options

for different levels of UM/UIM coverage under separate headings for each. There were no check marks next to any of the UM/UIM options.

In August 2000, the Bloods' son, Jay, was injured in a motor vehicle accident and sought underinsured motorist coverage from Old Guard after collecting the liability limits under the driver's policy. Old Guard paid Jay Blood $105,000 representing a $35,000 limit on the UIM coverage for three stacked vehicles. Jay Blood filed a declaratory judgment action seeking a determination as to the UIM limits under the Old Guard policy.

Blood advanced the argument that the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL), 75 Pa. C.S.A. § 1701 *et seq.*, requires the UIM coverage be the same as the liability coverage because his parents did not choose a lower level of UIM coverage when they decreased the liability coverage under the Old Guard policy.

In *Blood*, in beginning its analysis of this issue, the Pennsylvania Superior Court referred to its decision in *Smith v. The Hartford Ins. Co.*, 2004 Pa. Super. 145, 849 A.2d 277 (Pa. Super. 2004) *appeal denied*, 581 Pa. 708, 867 A.2d 524 (2005) in which it found that the subsequent purchase of higher liability limits does not act to obviate a previous *rejection* of UIM coverage. In *Blood*, the Superior Court noted language in the *Smith* decision concerning "sign-down" cases, or cases in which the insured submits a written request for limits of UM/UIM coverage that are lower than the liability limits.

In *Smith*, with respect to the "sign-down" issue, the Superior Court stated:

> Case law indicates that when the liability limits change a new request for lower limits must also be submitted or the statutorily mandated equal limits will apply. See generally *Cebula v. Royal & Sun Alliance Inc. Co.*, 158 F. Supp. 455 (M.D. Pa. 2001)[*sic*].

Smith, 849 A.2d at 281.

However, in *Blood*, in concluding that the UIM coverage limit of the Old Guard policy was increased to be the same as the revised bodily injury liability coverage limit, the Superior Court focused on the particular form used by Old Guard and the presence of options for declaring the UIM and UM coverage limit, stating:

> Had these options not been present on the face of the form signed by the Bloods, Old Guard's contention that the form was capable only of modifying the liability coverage of the policy may have had some merit. However, those are not the facts presently before the Court.

Blood, 894 A.2d at 798.

The Superior Court further stated with respect to the form signed by the Bloods:

> Of course, as the party responsible for drafting the document, Old Guard was capable of protecting itself from such results. It could have dedicated forms for modification of each type of coverage limit.

Id.

The Third Circuit Court in this case considered the Superior Court opinion in *Blood* stating:

> However, in *Blood*, the insured had been presented with a 'change request form' containing sections pertaining to both liability and UM/UIM coverage. This alone distinguishes *Blood* from the present case.

[Pet. App. 7].

The Third Circuit Court went on to state that *Blood* was not a decision by the Supreme Court of Pennsylvania, that there was no decision of the Pennsylvania Supreme Court dealing with the precise issue, and that, "it is well-established that Pennsylvania inferior courts may influence our opinion if we are persuaded by their analysis." However, the Third Circuit Court further stated that "[w]e are not persuaded here that *Blood* requires us to rule in favor of Merdjanian." (Pet. App. 7).

In its analysis, the Third Circuit Court discussed the applicable sections of the Pennsylvania Motor Vehicle Responsibility Law, 75 Pa.C.S.A. § 1701 *et seq*. and decisions of the Pennsylvania Supreme Court with respect to certain of those sections. The Third Circuit Court noted that Nationwide had provided Merdjanian with the notice prescribed by section 1791 of the MVFRL stating:

> Under section 1791, once an insurance applicant has been informed of the available choices for UM/UIM coverage, and opted to reject or reduce such coverage in conformity with the requirements of section 1731 and 1734, the insurer has no

> further obligation to provide notice or rejection with regard to UM/UIM coverage. Here, Nationwide provided Merdjanian with the notice prescribed by section 1791 and obtained his written application for reduced UM/UIM coverage in the amount of $15,000/$30,000. Nothing more was required.

[Pet. App. 7].

Further, as pointed out by the dissent in *Blood* and by the District Court in this case[1], the majority decision in *Blood* relied on dicta from *Smith*. The Superior Court dicta in *Smith* relied on *Cebula v. Royal & SunAlliance Ins. Co.*, 158 F. Supp. 2d 455 (M.D. Pa. 2001), a case that is clearly distinguishable. In *Cebula*, the insureds had *never* signed a written request to have the UM/UIM coverage be lower that the bodily injury coverage.

The distinguishing facts of *Blood* and the flaws in the Superior Court's analysis were also noted in *State Farm Mutual Automobile Ins. Co. v. Hughes*, 438 F. Supp. 2d 526 (E.D. Pa. 2006), a decision that was issued before the Third Circuit Court's decision in this case.

The Rules of Decision Act, 28 U.S.C.A. § 1652 (West 1994), provides that the laws of the several states, except

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1. As noted in *State Farm Mutual Auto Ins. Co. v. Hughes*, 438 F. Supp. 2d 526, 543 (E.D. Pa. 2006), the District Court's decision in *Merdjanian* analyzed a December 30, 2004 panel decision by the Superior Court in *Blood*. This decision was subsequently vacated and replaced by the en banc Superior Court *Blood* decision issued on March 2, 2006. However, the en banc court's analysis is consistent with the analysis of the panel as described by the District Court in *Merdjanian*.

where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. The highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. *West v. AT&T Co.*, 311 U.S. 233, 237, 61 S. Ct. 179, 85 L. Ed. 139 (1940).

This Court has found, in certain situations, that the decisions of state intermediate courts should be followed by a federal court in deciding a state question. In *West*, this Court stated that the Court of Appeals for the Sixth Circuit was not free to reject the decision of the intermediate state appellate court of Ohio merely because it had not received the sanction of the highest state court. In *West*, the court of appeals of Ohio had previously decided the *same case* between the *same parties*. The Supreme Court of Ohio had declined to review the decision.

In *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940), this Court found that the Court of Appeals for the Third Circuit was wrong to disregard two decisions of the Chancery Court of New Jersey which were not reviewed by the Court of Errors and Appeals, the highest state court. Significantly, this Court noted that the Third Circuit Court found it impossible to distinguish the facts in the two Chancery cases from those shown in the case before it.

This case does not present a situation in which the Third Circuit Court of Appeals was required to follow a decision by a Pennsylvania intermediate appellate court.

In this matter, there is a single state court case that has addressed the issue presented to the Third Circuit Court and that case is *Blood*. The Third Circuit Court distinguished *Blood* on the facts. Given the focus of the Superior Court in *Blood* on the particular form used by Old Guard, there is no assurance that the Superior Court itself would arrive at the same conclusion under the facts of this case. Further, the Third Circuit Court was not persuaded by the analysis in *Blood*. The analysis in *Blood* has been criticized because it relies on dicta and the dicta relies on a case that is clearly distinguishable. Finally, the Pennsylvania Supreme Court has accepted *Blood* for review so its continued viability is in question.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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